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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-200847.3 DATE: August 28, 1981

MATTER OF: Jack Roach Cadillac -- Request for
Reconsideration

DIGEST:

Prior decision is affirmed where record on reconsideration does not show that prior decision was based on error of law or fact.

Jack Roach Cadillac requests reconsideration of our decision in Bob McDorman Chevrolet, Inc. and Jack Roach Cadillac, B-200846, B-200847, B-200847.2, B-200848, March 13, 1981, 81-1 CPD 194, in which we dismissed its protest against the award of two contracts to Metro Automotive Parts by the Defense Logistics Agency (DLA).

Jack Roach Cadillac and Bob McDorman are franchised Chevrolet parts dealers, while Metro is not. Both protesters argued in connection with our initial decision that the solicitation (which was not expressly limited to franchised Chevrolet parts dealers) could not be properly performed by a firm which does not hold such a franchise. We dismissed the argument because our Office does not review protests against affirmative determinations of responsibility unless the protester shows either that the solicitation contained a definitive responsibility criterion which was not applied or that procuring officials may have committed fraud. We also dismissed contentions by Jack Roach Cadillac relating to Metro's status as a regular dealer for purposes of the Walsh-Healey Act.

In requesting reconsideration, Jack Roach Cadillac asserts that the invitation's tight delivery schedule should have been treated as a definitive criterion of responsibility. Further, the firm says that this Office should find that the contracting officer failed to comply with internal Department of Defense and Army practices and procedures regarding preaward surveys. Jack Roach Cadillac suggests that this

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failure would constitute fraud or bad faith, and led to an improper affirmative determination of Metro's responsibility. Finally, the firm reiterates its contention that Metro falsely certified that it was a regular dealer for purposes of the Walsh-Healey Act.

The delivery schedule is not a definitive responsibility criterion. As we noted in our decision, a definitive responsibility criterion involves a specific and objective standard of responsibility, compliance with which cannot be waived by the contracting officer. The imposition of the standard is intended to establish an objective basis which, in the agency's view, will assure that the prospective awardee can meet the contractual obligation. Thus, as we pointed out, an express requirement that a firm be a franchised Chevrolet dealer would be such a definitive responsibility criterion. A statement in a solicitation of the contractual obligation itself (e.g., the requirement to deliver items on a specified schedule) states a performance requirement, not a definitive responsibility criterion. See Johnson Controls, Inc., B-200466, February 20, 1981, 81-1 CPD 120.

Jack Roach Cadillac's second contention is that the alleged inadequacy of the preaward survey of Metro evidenced fraud or bad faith by the contracting agency. Jack Roach Cadillac complains that contracting personnel did not request a sufficiently in-depth survey, and that surveying personnel failed to conduct an adequate survey.

The record indicates that the surveying activity was asked to determine whether Metro could furnish the entire line of parts listed in the solicitation as well as other items of a commercial nature which might be ordered under the contract, whether Metro could supply required items within the required delivery schedule, and whether Metro had sufficient credit to perform the contract. The preaward survey report concluded that Metro was capable of performing.

We see no basis to find that contracting officials acted fraudulently or in bad faith. The nature and extent of a preaward survey needed to assure a contracting officer that a firm will meet its contractual obligation necessarily is for the contracting officer's judgment. The reason is that the contracting officer is in the best position to assess responsibility, and must bear the consequences of any difficulties experienced because of the contractor's inability to perform in the time and manner required. Edw. Kocharian & Company, Inc. -- request for modification, 58 Comp. Gen. 516, 520 (1979), 79-1 CPD 326. Thus, for example, in judging a firm's capability a contracting officer even may rely on a recent preaward survey report on a prior procurement for a different item. See Orlotronics Corporation, B-180467, May 13, 1974, 74-1 CPD 245.

Regarding Jack Roach's complaint that Metro falsely certified that it was a regular dealer for purposes of the Walsh-Healey Act, which Jack Roach feels should result in a decision by our Office declaring the Metro contract void, we explained in our prior decision that it was not our function to determine whether a firm properly certified that it is a regular dealer under that Act. We pointed out that this function rests in the first instance with the contracting activity, subject to final review by the Small Business Administration or the Secretary of Labor as appropriate, and that our role is limited to considering whether the contracting officer met his regulatory procedural responsibilities under the act.

In the circumstances, we find no basis to alter our initial decision, which is affirmed.


Acting Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-200847.3

August 28, 1981

The Honorable Thomas F. Eagleton
United States Senate

Dear Senator Eagleton:

We refer to your letter dated March 18, 1981 expressing interest in the request for reconsideration filed by your constituent, Jack Roach Cadillac, Inc. regarding our decision in Bob McDorman Chevrolet, Inc. and Jack Roach Cadillac, B-200846, B-200847, B-200848, March 13, 1981, 81-1 CPD 194. We are enclosing a copy of our decision of today which affirms our prior decision.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Jordan".

Acting Comptroller General
of the United States

Enclosure